Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO 44-143-92
VINCENT NG JC
4 JANUARY 1994

Constitutional Law *— Preventive detention — Application for habeas corpus — Report of the reporting officer appended in the affidavit of the assistant commissioner of police — Whether report inadmissible in evidence as it ran foul of the rule that the court was entitled to the best evidence — Report a public document — Whether s 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1965 had been complied with — Dangerous Drugs (Special Preventive Measures) Act 1965 s 3(2)(c) — Evidence Act 1950 ss 65 & 74*

Constitutional Law *— Preventive detention — Application for habeas corpus — Whether such proceedings are criminal or civil causes — Rules of the High Court 1980 — Criminal Procedure Code (FMS Cap 6)*

The only issue for determination in this application for a writ of habeas corpus was the question as to whether s 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') had been complied with by the respondents in the detention of the applicant. Counsel for the applicant contended that the provision of the Act could not be taken as being complied with by the mere appending of the necessary report of the reporting officer ('exh YKS1') in the affidavit of the assistant commissioner of police. It was submitted that exh YKS1 was inadmissible in evidence as it ran foul of the rule that the court was entitled to the best evidence. It was conceded by counsel for the applicant that exh YKS1 was a public document.

A collateral point, which developed during the course of argument on the rules governing affidavits, was whether they should be governed by the Rules of the High Court 1980 ('the RHC') or s 365 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') and whether such matters were criminal or civil causes.

Held, dismissing the application:

(1) Habeas corpus proceedings are quasi-criminal proceedings under s 365 and Ch XXXVI of the CPC, and the word 'affidavit' in s 366 under the same chapter when read in conjunction with the aforesaid words in s 424(i) of the CPC clearly ordains the application of certain provisions of the RHC to habeas corpus proceedings.

(2) Where the document is a public document, the best evidence rule is inapplicable. Secondary evidence may be adduced not only as to the existence of such document but also as to its contents. Therefore there was no gap in the chain of evidence relating to the authorization for the detention of the applicant and the contents of exh YKS1 showed that s 3(2)(c) has been duly complied with.

A **[Bahasa Malaysia summary**

Satu-satunya isu untuk dipertimbangkan di dalam permohonan untuk writ habeas corpus ini adalah soalan sama ada s 3(2)(c) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta itu') telah dipatuhi oleh responden apabila pemohon ditahan. Peguambela
B pemohon telah berhujah bahawa peruntukan Akta itu tidak boleh dikatakan sebagai telah dipatuhi hanya kerana laporan yang diperlukan oleh pegawai itu ('eks YKS1') telah dilampirkan bersama afidavit penolong pesuruhjaya polis. Telah dihujahkan bahawa eks YKS1 tidak boleh diterima sebagai keterangan kerana ianya tidak mematuhi
C peraturan bahawa mahkamah berhak mendapat keteranagn yang terbaik. Peguambela pemohon telah mengaku bahawa eks YKS1 merupakan suatu dokumen awam.

Suatu perkara kolateral, yang telah timbul dalam pertikaian mengenai kaedah-kaedah yang menentukan afidavit, adalah sama ada mereka sepatutnya ditentukan oleh Kaedah-Kaedah Mahkamah Tinggi
D 1980 ('KMT itu') atau s 365 Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu') dan sama ada perkara sedemikian adalah perkara jenayah atau sivil.

Dibenarkan, menolak permohonan itu:

E (1) Prosiding habeas corpus merupakan prosiding kuasi jenayah di bawah s 365 dan Bab XXXVI Kanun itu, dan perkataan 'afidavit' di dalam s 366 di bawah bab yang sama apabila dibaca bersama dengan perkataan di dalam s 424(i) Kanun itu dengan jelas membenarkan pemakaian peruntukan tertentu di dalam KMT itu kepada prosiding habeas corpus.

F (2) Apabila sesuatu dokumen merupakan suatu dokumen awam, kaedah keterangan terbaik tidak terpakai. Keterangan sekunder boleh dikemukakan bukan hanya untuk menunjukkan kewujudan sesuatu dokumen itu tetapi isinya juga. Oleh itu, tidak terdapat ruang di dalam rantaian keterangan berkaitan dengan
G pemberikuasaan untuk penahanan pemohon dan kandungan eks YKS1 menunjukkan bahawa s 3(2)(c) telah dipatuhi.]

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Criminal Appeal No 05–128–93.]

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Notes

For cases on applications for habeas corpus, see 10 *Mallal's Digest* (4th Ed) paras 1045–1047.

Cases referred to

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1 *Osman bin Mat Isa & Ors v Superintendent of Prison, Alor Star, Kedah & Anor* [1974] 1 MLJ 189 (refd)

2 *Voon Mow Chen v Menteri Dalam Negeri Malaysia & Anor* [1993] 2 AMR 38: 2199 (refd)

3 *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95 (refd)
4 *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 (refd)
5 *Chiam Ching Kiang v Menteri Hal Ehwal Dalam Negeri, Malaysia & Lain* [1993] 1 AMR 6: 211 (refd)
6 *Yeow Boon Kee v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1993] 2 MLJ 359 (folld)

Legislation referred to
Evidence Act 1950 ss 65, 74
Criminal Procedure Code (FMS Cap 6) s 424(i)
Rules of the High Court 1980 O 1 r 2(2)

Karpal Singh (*Karpal Singh & Co*) for the applicant.
Mahmud bin Haji Abdullah (*Noorbahri bin Baharuddin* with him) (Senior Federal Counsel) for the respondents.

Vincent Ng JC: The only issue for determination in this application for a writ of habeas corpus is the question whether s 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') had been complied with by the respondents in the detention of the applicant. Counsel for the applicant, Encik Karpal Singh, contended that the provision of the Act could not be taken as being complied with by the mere appending of the necessary report of the reporting officer, exh YKS1, in the affidavit of the assistant commissioner of police, Encik Yap Kim Seng (encl 18). It has been submitted that exh YKS1 was inadmissible in evidence as it ran foul of the rule that the court is entitled to the best evidence. Exhibit YKS1 is the report of Encik Osman bin Awal, who was, until the hearing of the matter, on leave in London; though it was not disputed that he was at the material time of the report, a proper reporting officer.

It has been conceded by Encik Karpal Singh that YKS1 is a public document. He, however, contended that YKS1 is only secondary evidence and as an affidavit sworn by Osman bin Awal has not been adduced by the respondent, there is a gap in the documentary evidence adduced to show lawful detention. Furthermore, he added, encl 18 contained no averment that an affidavit from Osman bin Awal could not be procured without an amount of great delay or expense, to bring it within the scope of s 32 of the Evidence Act 1950.

The other collateral point, which developed during the course of argument on the rules governing affidavits, was whether they should be governed by the Rules of the High Court 1980 ('the RHC') or s 365 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') and whether such matters are criminal or civil causes. The reason being that if habeas corpus applications are criminal rather than civil in its proceedings, then the courts could take a stricter view in respect of the nature and degree of proof required in relation to the chain of evidence on the various procedures involved in the detention of a person; more specifically, concerning the receivability or admissibility of the various necessary pieces of evidence. This is also quite

apart from the question of awardability of costs in habeas corpus proceedings, which has been specifically dealt with in the case of *Osman bin Mat Isa & Ors v Superintendent of Prison, Alor Star, Kedah & Anor.*[1]

Whilst there is a welter of authorities in respect of the procedures that the authorities has to strictly comply with to ensure that the detinue's detention is legal, there is however, from the evidential point of view, a dearth of authorities on the qualitative nature of proof of such due compliance with the procedures of detention.

Mr Shanmugam who addressed the court as an amicus curiae, at the invitation of the court, suggested that the part of this court's decision in *Voon Mow Chen v Menteri Dalam Negeri Malaysia & Anor*[2] which says that O 41 of the RHC governs the use of affidavits in habeas corpus proceedings, may be amiss on the law, due to a provision in the RHC itself (he was unable to specify which provision) which expressly ousts its applicability to criminal proceedings.

This application was heard on 6 December 1993 but upon the request of both the parties, further hearing was adjourned to 22 December 1993. This request followed the suggestion of the court that further research be worked on the issue of whether habeas corpus proceedings are criminal or civil causes and, if criminal, whether the court should review its decision in *Voon Mow Chen*[2] on the use of O 41 of the RHC.

I shall now deal with the collateral issue before turning to the main issue.

Encik Noorbahri was affirmative in his support of this court's view in *Voon Mow Chen*[2] that affidavit evidence in habeas corpus proceedings is governed by the RHC, and he further submitted that such proceedings may fall within constitutional or administrative legal boundaries. Whereas, Encik Karpal Singh was non-committal but submitted that the best evidence rule is applicable to civil as well as criminal proceedings; this at any rate was never in dispute.

Ballentine's Law Dictionary (3rd Ed) at p 291 defines 'criminal proceedings' as:

> A proceeding in court in the prosecution of a person charged or to be charged with the commission of a crime, contemplating the conviction and punishment of the person charged or to be charged.

In the introduction to the work *Criminal Law in Singapore and Malaysia* (1989), CMV Clarkson was of the following view (at p 15) and I quote:

> Some local statutes are often thought by lay observers to relate to the criminal law — largely because they involve the physical detention of persons which appears to resemble the punishment of imprisonment. Thus in Singapore the Internal Security Act (Cap 143), s 8 permits the detention without trial for up to two years of any person 'with a view to preventing that person from acting in any manner prejudicial to the security of Singapore ... or to the maintenance of public order or essential services therein ...'. (See also the Criminal Law (Temporary Provisions) Act (Singapore) (Cap 67) and the preventive detention laws in ss 149 and 150 of the Malaysian Constitution both of which statutes permit detention without trial in specified circumstances.) None of these provisions deals with the criminal law as they are not concerned with the establishment in a court of law that the accused committed an offence for which he can be punished.

The only two Malaysian cases that deal with this collateral issue is *Osman bin Mat Isa & Ors*[1] which was directly on the point, and *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors*,[3] in which, though this point was neither in issue nor dealt with, Abdoolcader SCJ (as he then was), made the following suggestion [at p 98] by way of a footnote at the end of the case, which I take the liberty to quote here:

> We would as a footnote suggest for urgent consideration the repeal by Parliament of s 365 and such of its concomitant provisions in Ch XXXVI of the Criminal Procedure Code as have been rendered redundant as a result of the introduction of O 54 of the Rules of the High Court 1980 which provides for applications for habeas corpus.

In *Osman bin Mat Isa*,[1] Chang Min Tat J (as he then was) made the following observation at p 190:

> The point made by Mr Karpal Singh was that an application for a writ of habeas corpus was a civil or a quasi-civil matter. He relied on *Amand v Home Secretary and Minister of Defence of the Royal Netherlands Government* [1943] AC 142 which in the state of things that existed during the Second World War was within the jurisdiction of the English courts. The House of Lords held that the test as to whether a proceeding was a criminal cause or matter depended upon the nature and character of the proceeding; if the matter was one the direct outcome of which might be the trial of the person charged and his possible punishment for an alleged offence the matter was criminal.

His Lordship then went on to hold:

> Applying the test in *Amand*'s case then, how could I come to any other conclusion than that these matters are criminal causes? I therefore adopt with respect the decision of my brother Abdul Hamid J in *Munusamy*'s case [1969] 2 MLJ 108 that the matter was governed by Pt XXXVI of the Criminal Procedure Code (Cap 6) in the Malay States and the application should have been made under s 365 thereof.

In my opinion, when one applies strictly the test in *Amand v Home Secretary and Minister of Defence of the Royal Netherlands Government*,[4] the views of CMV Clarkson and the definition of 'criminal proceedings' in *Ballentine's Law Dictionary*, it is difficult for this court to be persuaded to the view that habeas corpus proceedings are distinctly and strictly criminal causes.

However, being mindful of the following reasons:

(a) habeas corpus proceedings are provided only in s 365 of the CPC (O 54 of the RHC having been deleted with effect from 1 August 1993);
(b) it does not involve the trial or punishment of the detinue as in the test applied in *Amand*'s case;[4]
(c) despite the absence of a trial or punishment, yet the detinue suffers a disadvantage which appears to resemble the punishment of imprisonment, through his physical detention against his will; and
(d) the absence of a specific act with specific provisions such as a Habeas Corpus Act — which specific Act governing habeas corpus proceedings, I am informed, is available in the United Kingdom;

A this court is constrained to the view that habeas corpus proceedings are quasi-criminal causes or matters. In graphic language, it is neither a horse nor a donkey — probably a zebra with black and white stripes.

Obviously groping in this murky state of law, Encik Karpal Singh suggested that the words in s 424(i) of the CPC, '*subject to any rules of Court*, any affidavit may be used in a criminal court ...' (emphasis added) may B encompass the RHC. This would, in turn, accord with the contention of Encik Noorbahri that O 41 of the RHC would govern the rules (as decided in *Voon Mow Chen*[2]) on affidavits used in habeas corpus proceedings. It would nevertheless still leave us to contend with O 1 r 2(2) of the RHC which states as follows:

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> These rules shall not have effect in relation to proceedings *in respect of which rules have been or may be made* under any written law for the specific purpose of such proceedings *or in relation to any criminal proceeding*. (Emphasis added.)

This rule clearly excludes the application of the RHC to any (so to say, full blooded) criminal proceedings.

D However, as habeas corpus proceedings are not strictly and distinctly criminal proceedings but rather only quasi-criminal, and are proceedings in which no 'rules have been made under any written law' for a specific purpose of such proceedings, it is eminently permissible for this court to hold, as in *Voon Mow Chen*,[2] that certain provisions of the RHC, eg O 41, E are applicable to habeas corpus proceedings, by virtue of the phrase 'subject to any rules of the court' occurring in s 424(i) of the CPC, which in turn governs proceedings under s 365 of the CPC.

To summarize, this court holds that until otherwise legislated, habeas corpus proceedings are quasi-criminal proceedings (*a la* maintenance proceedings) under s 365 and Ch XXXVI of the CPC, and the word F 'affidavit' in s 366 under the same chapter when read in conjunction with the aforesaid words in s 424(i) of the CPC clearly ordains the application of certain provisions of the RHC to habeas corpus proceedings — admittedly, an unsatisfactory sort of mixed dish, not unlike a salad of mixed fruit and vegetables.

G On the main issue, in my view, the only material point in dispute is whether exh YKS1 comes within the ambit of the exceptions to the 'best evidence rule', namely, whether secondary evidence is admissible to prove compliance of the said provision of the Act. Encik Karpal Singh cited two conflicting authorities — in both of which there was no appeal. The authorities being *Chiam Ching Kiang v Menteri Hal Ehwal Dalam Negeri,* H *Malaysia & Lain*[5] and *Yeow Boon Kee v Timbalan Menteri Dalam Negeri, Malaysia & Anor.*[6] In *Yeow Boon Kee*'s case,[6] it was held by LC Vohrah J that a duly certified true copy of the report of the reporting officer, who was only away in nearby Indonesia, exhibited in the respondents' affidavit, is admissible under the Evidence Act 1950. Whereas, in *Chiam Ching Kiang*,[5] I it was held that a similar report by the reporting officer, who was at the material time in Cambodia, was inadmissible, and this had caused a break in the chain of evidence relating to the authorization for the detention under the relevant provision.

Section 65 states as follows : A

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

...

(e) when the original is a public document within the meaning of section 74; ... B

Section 74 states as follows:

The following documents are public documents :

(a) documents forming the acts or records of the acts of —

...

(ii) official bodies and tribunals; and C

(iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country, and ...

My careful reading of ss 65 and 74 found myself compelled to the conclusion that where the document is a public document, the best evidence rule is D inapplicable. Also, further, that secondary evidence may be adduced (as in our current case) not only as to the existence of such document but also as to its contents. I would thus readily agree with LC Vohrah J's judgment in *Yeow Boon Kee.*[6]

For the above reasons, there is therefore in my view no gap in the chain E of evidence relating to the authorization for the detention of the applicant and the contents of exh YKS1 showed that s 3(2)(c) has been duly complied with. In the result, the application was, on 22 December 1993, dismissed.

I trust that the appeal against my decision herein would be pursued to its final conclusion, even if only with the view to development of the law and for its academic value. F

Application dismissed.

Reported by Jeanne Tan

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